

TABATHA NEU,
Plaintiff,
v.
MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

JURISDICTION

Plaintiff initially protectively applied for Social Security Income ("SSI") benefits in November of 2001. (Tr. 81-83.) The

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 1

1 application was denied initially and on reconsideration. (Tr. 33-
2 34.) Plaintiff did not appeal. Plaintiff protectively filed a
3 second application for SSI on June 16, 2003. (Tr. 84-85.) She
4 alleged disability since October 10, 2001, due to limitations in
5 lifting, standing, use of right hand, panic attacks, and depression.
6 (Tr. 46, 92.) The application was denied initially (Tr. 46-49) and
7 on reconsideration (Tr. 51-52). Plaintiff appeared before
8 Administrative Law Judge (ALJ) Paul Gaughen on July 21, 2005. The
9 ALJ heard the testimony of Plaintiff and Jean Schoppe, Plaintiff's
10 mother. (Tr. 755-784.) The ALJ held a supplemental hearing on
11 February 27, 2006. (Tr. 787-810.) Medical expert Jay Toews, Ed. D.,
12 and vocational expert (VE) Tom Moreland testified. The ALJ issued
13 a decision on April 28, 2006, finding that Plaintiff was not
14 disabled. (Tr. 16-32.) The Appeals Council received additional
15 evidence (Tr. 736-751) and denied a request for review on December
16 11, 2006. (Tr. 9-11.) Therefore, the ALJ's decision became the
17 final decision of the Commissioner, which is appealable to the
18 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
19 action for judicial review pursuant to 42 U.S.C. § 405(g) on
20 February 8, 2007. (Ct. Rec. 7.)

21 **STATEMENT OF FACTS**

22 The facts have been presented in the administrative hearing
23 transcript, the ALJ's decision, the briefs of both Plaintiff and the
24 Commissioner and will only be summarized here.

25 Plaintiff was 35 years old on the amended onset date, and 37 on
26 the date of the ALJ's decision. (Tr. 101.) She earned a GED and
27 completed some college courses. (Tr. 98, 519.) Plaintiff last
28 worked as a food server and food preparer in 2001. (Tr. 92-93.)

1 She lives with her mother, does not drive, and usually goes to
2 church weekly. (Tr. 757-760.) Plaintiff walks the dog, cooks a
3 little, does laundry, and chats with her daughter online. (Tr. 758,
4 761, 767, 775.) She takes Excedrin for daily headaches, experiences
5 back pain, and drops things in her right hand. (Tr. 763, 765-766.)
6 Plaintiff testified that she had not taken illegal drugs for two
7 years, meaning since July 15, 2003. (Tr. 762.) Plaintiff does not
8 challenge the ALJ's findings with respect to her physical
9 impairments, which were found non-severe.

10 SEQUENTIAL EVALUATION PROCESS

11 The Social Security Act (the "Act") defines "disability" as the
12 "inability to engage in any substantial gainful activity by reason
13 of any medically determinable physical or mental impairment which
14 can be expected to result in death or which has lasted or can be
15 expected to last for a continuous period of not less than twelve
16 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also
17 provides that a Plaintiff shall be determined to be under a
18 disability only if any impairments are of such severity that a
19 Plaintiff is not only unable to do previous work but cannot,
20 considering Plaintiff's age, education and work experiences, engage
21 in any other substantial gainful work which exists in the national
22 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the
23 definition of disability consists of both medical and vocational
24 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir.
25 2001).

26 The Commissioner has established a five-step sequential
27 evaluation process for determining whether a person is disabled. 20
28 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is

1 engaged in substantial gainful activities. If so, benefits are
2 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
3 the decision maker proceeds to step two, which determines whether
4 Plaintiff has a medically severe impairment or combination of
5 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

6 If Plaintiff does not have a severe impairment or combination
7 of impairments, the disability claim is denied. If the impairment
8 is severe, the evaluation proceeds to the third step, which compares
9 Plaintiff's impairment with a number of listed impairments
10 acknowledged by the Commissioner to be so severe as to preclude
11 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),
12 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App. 1. If the
13 impairment meets or equals one of the listed impairments, Plaintiff
14 is conclusively presumed to be disabled. If the impairment is not
15 one conclusively presumed to be disabling, the evaluation proceeds
16 to the fourth step, which determines whether the impairment prevents
17 Plaintiff from performing work which was performed in the past. If
18 a Plaintiff is able to perform previous work, that Plaintiff is
19 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),
20 416.920(a)(4)(iv). At this step, Plaintiff's residual functional
21 capacity ("RFC") assessment is considered. If Plaintiff cannot
22 perform this work, the fifth and final step in the process
23 determines whether Plaintiff is able to perform other work in the
24 national economy in view of Plaintiff's residual functional
25 capacity, age, education and past work experience. 20 C.F.R. §§
26 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137
27 (1987).

28 The initial burden of proof rests upon Plaintiff to establish

1 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
2 v. *Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172
3 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is met once
4 Plaintiff establishes that a physical or mental impairment prevents
5 the performance of previous work. The burden then shifts, at step
6 five, to the Commissioner to show that (1) Plaintiff can perform
7 other substantial gainful activity, and (2) a "significant number of
8 jobs exist in the national economy" which Plaintiff can perform.
9 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

10 Plaintiff has the burden of showing that drug and alcohol
11 addiction ("DAA") is not a contributing factor material to
12 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).
13 The Social Security Act bars payment of benefits when drug addiction
14 and/or alcoholism is a contributing factor material to a disability
15 claim. 42 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Sousa v.*
16 *Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If there is evidence
17 of DAA and the individual succeeds in proving disability, the
18 Commissioner must determine whether the DAA is material to the
19 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If
20 an ALJ finds that the claimant is not disabled, then the claimant is
21 not entitled to benefits and there is no need to proceed with the
22 analysis to determine whether substance abuse is a contributing
23 factor material to disability. However, if the ALJ finds that the
24 claimant is disabled, then the ALJ must proceed to determine if the
25 claimant would be disabled if he or she stopped using alcohol or
26 drugs. *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001).

27 STANDARD OF REVIEW

28 Congress has provided a limited scope of judicial review of a

1 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold
2 the Commissioner's decision, made through an ALJ, when the
3 determination is not based on legal error and is supported by
4 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
5 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
6 "The [Commissioner's] determination that a plaintiff is not disabled
7 will be upheld if the findings of fact are supported by substantial
8 evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983)
9 (citing 42 U.S.C. § 405(g). Substantial evidence is more than a
10 mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th
11 Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*,
12 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of*
13 *Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988).
14 Substantial evidence "means such evidence as a reasonable mind might
15 accept as adequate to support a conclusion." *Richardson v. Perales*,
16 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences
17 and conclusions as the [Commissioner] may reasonably draw from the
18 evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289,
19 293 (9th Cir. 1965). On review, the court considers the record as
20 a whole, not just the evidence supporting the decision of the
21 Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)
22 (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

23 It is the role of the trier of fact, not this court, to resolve
24 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
25 supports more than one rational interpretation, the court may not
26 substitute its judgment for that of the Commissioner. *Tackett*, 180
27 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
28 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in
2 weighing the evidence and making the decision. *Browner v. Secretary*
3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987).
4 Thus, if there is substantial evidence to support the administrative
5 findings, or if there is conflicting evidence that will support a
6 finding of either disability or nondisability, the finding of the
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
8 1230 (9th Cir. 1987).

9 **ALJ'S FINDINGS**

10 The ALJ found at step one that Plaintiff has not engaged in
11 substantial gainful activity during any time at issue. (Tr. 18.) At
12 step two, the ALJ found that the medical evidence established that
13 Plaintiff suffered from the severe impairments of major depressive
14 disorder and drug and alcohol dependence. (Tr. 18.) At step three,
15 the ALJ found that Plaintiff's impairments, including substance
16 abuse, meet section 12.09 of 20 C.F.R. Part 404, Subpart P, Appendix
17 I (20 C.F.R. § 416.920(d)). (Tr. 26.) Because Plaintiff's
18 impairments met one of the Listings impairments, the ALJ found
19 Plaintiff disabled. (Tr. 26.) The ALJ then considered whether,
20 absent substance abuse, Plaintiff's remaining limitations would
21 cause more than a minimal impact on her ability to perform basic
22 work activities. (Tr. 26.) He concluded that if substance abuse
23 stopped, Plaintiff would still experience major depression that
24 would interfere with understanding and memory, social interaction,
25 and adaptation, but the impairment or combination of impairments
26 does not meet or medically equal a Listings impairment. (Tr. 26-
27 27.) The ALJ found Plaintiff less than completely credible. (Tr.
28 28.) The ALJ considered Plaintiff's credibility when he weighed the

1 medical evidence and determined Plaintiff's RFC. (Tr. 28.) The ALJ
2 found that, absent substance abuse, Plaintiff has the RFC to
3 perform a range of medium work with some limitations caused by
4 mental impairments. (Tr. 27-31.) At step four, the ALJ found that,
5 absent substance abuse, Plaintiff could perform her past relevant
6 work as a laminator. (Tr. 31.) The ALJ found that because
7 Plaintiff would not be disabled if she stopped abusing substances,
8 substance abuse disorder is contributing factor material to the
9 disability determination. (Tr. 31.) Accordingly, the ALJ
10 determined at step four of the sequential evaluation process that
11 Plaintiff was not disabled within the meaning of the Social Security
12 Act because she can perform her past relevant work if there is no
13 substance abuse. (Tr. 31-32.)

14 **ISSUES**

15 Plaintiff contends that the Commissioner erred as a matter of
16 law. Specifically, she argues that the ALJ erred when he 1) weighed
17 the medical evidence; 2) determined that her impairments did not
18 meet or equal a Listings impairment; 3) assessed Plaintiff's RFC;
19 and 4) found that substance abuse was a contributing factor material
20 to disability. (Ct. Rec. 15, Att. at 10-16.)

21 The Commissioner opposes the Plaintiff's motion and asks that
22 the ALJ's decision be affirmed. (Ct. Rec. 19 at 12.)

23 **DISCUSSION**

24 **A. Weighing Medical Evidence**

25 In social security proceedings, the claimant must prove the
26 existence of a physical or mental impairment by providing medical
27 evidence consisting of signs, symptoms, and laboratory findings; the
28 claimant's own statement of symptoms alone will not suffice. 20

1 C.F.R. § 416.908. The effects of all symptoms must be evaluated on
2 the basis of a medically determinable impairment which can be shown
3 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical
4 evidence of an underlying impairment has been shown, medical
5 findings are not required to support the alleged severity of
6 symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir. 1991).

7 A treating or examining physician's opinion is given more
8 weight than that of a non-examining physician. *Benecke v. Barnhart*,
9 379 F.3d 587, 592 (9th Cir. 2004). If the treating or examining
10 physician's opinions are not contradicted, they can be rejected only
11 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,
12 830 (9th Cir. 1996). If contradicted, the ALJ may reject an opinion
13 if he states specific, legitimate reasons that are supported by
14 substantial evidence. See *Flaten v. Secretary of Health and Human*
15 *Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995).

16 Plaintiff contends that the ALJ erred by giving greater weight
17 to the opinion of the testifying medical expert than to the opinions
18 of six treating and examining psychologists, and by failing to give
19 specific and legitimate reasons supported by substantial evidence
20 for discrediting the opinions of these mental health professionals.
21 (Ct. Rec. 15, Att. at 10-14.) The Commissioner responds that the ALJ
22 gave specific and legitimate reasons, supported by substantial
23 evidence, for rejecting the opinion of Rebecca Alexander, Ph. D.
24 The Commissioner further responds that the ALJ properly weighed the
25 opinion of the testifying expert and properly resolved the
26 conflicting medical and other evidence. (Ct. Rec. 19 at 12-14.)

27 The ALJ considered the opinion of treating psychologist Lee
28 Hendrickson, ARNP, Ph.D. Dr. Hendrickson noted on May 23, 2003

1 (about five months prior to the amended onset date of October 1,
2 2003), that Plaintiff had been in a relationship with a "felony
3 criminal" and was using amphetamines. (Tr. 452.) She was clean and
4 sober at the time of the appointment and had been putting in job
5 applications. (Tr. 452.) Plaintiff opined that her psychotropic
6 medications are much more effective when she is clean and sober.
7 (Tr. 452.) On June 19, 2003, Dr. Hendrickson noted that "crystal
8 crank" caused Plaintiff to be seen in a hospital emergency room for
9 a "severe paranoid reaction," although Plaintiff initially described
10 being given Ativan in the ER for extreme anxiety caused by being
11 given a cortisone-based medication. (Tr. 453.) The ER record of
12 May 31, 2003, shows that when she was admitted Plaintiff was "quite
13 paranoid"; she complained of a racing heart and nausea; eventually,
14 Plaintiff admitted that she had injected methamphetamine yesterday.
15 (Tr. 463.) ER physician Linden Bishop, M.D., notes that the
16 "patient has been using methamphetamine apparently significantly
17 over the last several months, possibly six months." (Tr. 463.) Dr.
18 Bishop observed multiple injection sites on both arms. (Tr. 464.)
19 He diagnosed acute anxiety secondary to methamphetamine overdose.
20 (Tr. 464.)

21 Also on June 19, 2003, Dr. Hendrickson noted that Plaintiff
22 appeared "less than contrite" in expressing remorse for "having
23 relapsed with street drugs yet again." (Tr. 453.) He noted:

24 I reviewed with the patient the fact that her anxiety
25 disorder is very much exacerbated and destabilized by the
26 use of illicit substances, in spite of her protestation
27 that she has never been to the ER before with this kind of
28 reaction. Also, I explained there really is no knowing
what she is ingesting with illicit substances. Her
therapist has recommended that we extend her DSHS grant
for another 60-days, and has arranged for a substance
abuse evaluation in a week, with the idea of [Plaintiff]
seeing someone for the substance abuse treatment as well

1 as her anxiety disorder. She is telling me today that she
2 is having panic attacks "at a rate of one to two a week,"
3 previously only one a month. I suspect that this
4 exacerbation is largely due to the recent relapse with
5 illicit substances, since she was relatively stable prior
6 to that.

7 (Tr. 453.)

8 On July 10, 2003, Dr. Hendrickson diagnosed major depression,
9 moderate and recurring, amphetamine abuse, with dependent and
10 borderline personality. (Tr. 455.) He opined that Plaintiff's
11 levels of anxiety and depression would be manageable with medication
12 and therapy if she sustained 60 days of abstinence from substance
13 abuse. (Tr. 455.) Dr. Hendrickson opined that substance abuse
14 greatly exacerbates Plaintiff's other diagnosed conditions. (Tr.
15 456.) He expected that Plaintiff would be severely impaired in two
16 areas of functioning, marked in one, and moderately impaired in four
17 areas, for a maximum period of twelve months. (Tr. 456-457.)

18 Five days later, on July 15, 2003, Plaintiff was seen in the ER
19 for trying to pull the "bugs" off of her, at times with tweezers and
20 possibly a knife. Plaintiff believed that "bugs" were causing
21 itching and a skin rash. (Tr. 467-468.) Old scars indicated that
22 this may have gone on for some time. (Tr. 467.) Plaintiff admitted
23 she that took methamphetamine and opiates yesterday, although she
24 did not admit to taking opiates until confronted with test results.
25 (Tr. 467.) The ER physician diagnosed opiate and methamphetamine
26 abuse and factitious dermatitis. (Tr. 468.) On July 18, 2003,
27 Tuck Ainge, PA-C, noted in follow-up that Plaintiff was to begin
28 intensive outpatient treatment on July 21, 2003. (Tr. 476.)

The ALJ notes that Plaintiff was seen in the ER on other
occasions. (Tr. 24.) On February 22, 2003, Linden Bishop, M.D.,

1 saw Plaintiff for a right hand fracture that happened after she hit
2 a wall with her hand. (Tr. 458.) Plaintiff was seen in the ER
3 about two months later, on April 24, 2003, after she punched a car
4 with her right hand. (Tr. 461.)

5 Plaintiff contends that the ALJ did not properly weigh the
6 January 8, 2002, opinion of examining psychologist James R.
7 Phillips, Ph.D. Dr. Phillips noted that Plaintiff drove herself 90
8 miles round trip to the appointment. (Tr. 278.) Plaintiff's
9 "(a)lleged disabilities are 'depression.'" (Tr. 278.) Plaintiff had
10 problems with depression since childhood, began counseling at age
11 thirteen, and experienced an increase in her depressive symptoms
12 during the past year. (Tr. 278.) Plaintiff indicated that she saw
13 Kay Anderson for weekly counseling and had taken antidepressants for
14 8 to 9 years. (Tr. 278.) She described her mood as gray and
15 gloomy. She had problems with memory and concentration, low energy,
16 loss of interest in past pleasurable activities, anhedonia,
17 difficulty sleeping, and poor appetite. (Tr. 278-279.) Plaintiff
18 reported she was not using alcohol or illicit drugs and became clean
19 and sober about six years ago. (Tr. 279.) The ALJ notes that
20 Plaintiff reported attending both inpatient and outpatient substance
21 abuse treatment. (Tr. 19.) Dr. Phillips diagnosed a depressive
22 disorder NOS with antisocial features and a current GAF of 55.¹ (Tr.

23
24
25 ¹A Global Assessment of Functioning of 51-60 indicates some
26 moderate symptoms (e.g., flat affect and circumstantial speech,
27 occasional panic attacks) or moderate difficulty in social,
28 occupational, or school functioning (e.g., few friends, conflicts
with peers or co-workers). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL
ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 12

1 280.)

2 The ALJ considered Dr. Phillips' report and noted that on
3 January 22, 2002 (two weeks after Dr. Phillips' evaluation),
4 treating therapist Kay Anderson observed:

5 Dr. Blankenship [Beth Blankenship, PA-C] had seen [her]
6 behavior as drug seeking and cut her off pain pills. She
7 is reported to have been noncompliant with her treatment.
8 [Plaintiff's] therapist also addressed concern over her
9 possible drug use and that she might need detox and there
is no evidence of a mental breakdown as she had been
coherent in justifying, rationalizing, and blaming only
one hour earlier.

10 (Tr. 19, referring to Tr. 518, 644.) The ALJ points out Ms.
11 Anderson's notation, also on January 22, 2002, that Plaintiff tried
12 to get out of work and get on SSI payments. (Tr. 29.) The ALJ
13 considered Ms. Anderson's statement that Plaintiff was non-compliant
14 with treatment because she refused all treatment options and, as a
15 result, Ms. Anderson closed her file. (Tr. 29, 518.)

16 The ALJ considered the records of Plaintiff's therapist Lynn-
17 Marie Peashka, APRN-BC:

18 While the claimant again complained on December 2, 2005,
19 of changes in her eating patterns, depression, anxiety,
20 panic attacks, sleep patterns, relationships and thoughts
21 which she cannot get out of her head. . . . The
22 therapist notes that it is interesting that in spite of
23 the fact that the claimant is reporting these changes, she
24 drew a smiley face at the bottom of her pre-visit
questionnaire. The therapist also states that the
claimant was the most clear and focused the therapist has
seen her since she began seeing her. The therapist felt
the claimant is improving and reaching a point where she
is possibly developing some concern about termination of
services, particularly her therapeutic interactions.

25 (Tr. 30, referring to Exhibit 59F at Tr. 707-708.)

26 The ALJ properly gave more weight to the opinions of treating
27 professionals Blankenship, Hendrickson, Anderson and Peashka than

28 _____
DISORDERS 4th Ed. (DSM-IV), at 32.

1 to examining psychologist Dr. Phillips' single evaluation.

2 Plaintiff alleges that the ALJ did not properly weigh the
3 opinion of examining psychologist Eileen Wright, Ph. D. The ALJ
4 summarized Dr. Wright's report based on her evaluation conducted
5 March 6 and March 20, 2002:

6 The claimant denies [to Dr. Wright] any use of drugs or
7 alcohol and has received no treatment for drug or alcohol
8 use. She is reported to be moderately cooperative and on
9 occasion oppositional to resistant. Her responses are
10 noted to be often flippant, indifferent and evasive. Her
11 mood was depressed and anxious with a restricted affect
12 that was often inappropriate and flippant. She
13 acknowledges panic attacks at least once a week, lasting
14 30 to 60 minutes each time. She often thinks of suicide
15 and cries every day some times more than once. . . .
16 Upon mental status examination, the claimant is reports
17 [sic] to have limited verbal skills and memory and
18 impaired concentration. . . . It is noted that her
19 medication is necessary for her best functioning. Dr.
20 Wright diagnosed the claimant with panic disorder without
21 agoraphobia and major depressive disorder, single episode,
22 severe, without psychotic features.

23 (Tr. 19-20, referring to Tr. 296-301.)

24 The ALJ observes that, on April 3, 2002, psychiatrist Michael
25 Reznicek, M.D., stated Plaintiff is "noted to have gotten high one
26 month ago," meaning in March of 2002, at or near the time of Dr.
27 Wright's assessment. (Tr. 29, referring to Exhibit 15F.)

28 Plaintiff alleges that the ALJ failed to properly credit the
opinion of Richard Gallaher, Jr., Ph.D., citing reports on February
11, 2002 (Tr. 310) and June 21, 2006. (Tr. 741-751.) The
evaluation dated February 11, 2002, signed by treating therapist Dee
Davison and Dr. Gallaher, indicates that Plaintiff is a new client.
(Tr. 312.) Plaintiff was "kicked out" of substance abuse treatment
in 1995. (Tr. 309.) An IQ test was recommended. (Tr. 309-310.)
Plaintiff was assessed with marked impairments with respect to
depressed mood and physical complaints, moderately impaired in the

1 ability to verbally express anxiety or fear, and moderately impaired
2 overall. (Tr. 310.) Plaintiff's diagnosis was adjustment disorder
3 with depression and anxiety and dependent personality. There was no
4 indication of alcohol or drug abuse; Plaintiff stated she last used
5 "crank 7 years ago," and denied substance abuse ("SA") issues. (Tr.
6 310.) Plaintiff was assessed as severely impaired in the ability to
7 exercise judgment and make decisions, and markedly impaired in the
8 ability to understand complex instructions, care for personal
9 hygiene, and respond appropriately to workplace pressures. (Tr.
10 311.) The report reflected she stated "she has no energy to do
11 anything - forces self to take a shower - unable to make decisions."
12 (Tr. 311.) The opinion was medication could help with anxiety,
13 sleeplessness and depression, and therapy should be helpful. The
14 expected maximum period of impairment is one year. (Tr. 311-312.)

15 In a second evaluation, dated June 21, 2006 (about two months
16 after the ALJ's decision), Dr. Gallaher diagnosed bipolar disorder
17 I, most recent depressed, PTSD, and a cognitive disorder nos. (Tr.
18 741-751.) The attempt to diagnose a psychiatric condition years
19 after the fact (in this case, three years after onset and two months
20 post-decision) lacks sufficient probative value to have any
21 evidentiary weight. *See Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th
22 Cir. 1984) ("after-the-fact psychiatric diagnoses are notoriously
23 unreliable").

24 The ALJ properly considered Plaintiff's credibility when he
25 weighed the conflicting medical evidence. The ALJ found Plaintiff
26 less than completely credible (Tr. 28), a finding that is not
27 challenged. In reaching this conclusion, the ALJ observed: (1)
28 Plaintiff's physical complaints are not supported by objective

1 medical evidence. Plaintiff complained that despite carpal tunnel
2 surgery on her right hand, she still drops things and has trouble
3 picking them up. The August 22, 2003, examination by Vivian Moise,
4 M.D., supports the ALJ's finding that there is no underlying
5 physical impairment which could reasonably be expected to produce
6 these symptoms. (2) Plaintiff's statements are contradicted by
7 treating professionals. Plaintiff said that she had to be
8 hospitalized for an anxiety attack; however, the ALJ notes her
9 treating therapist observed no evidence of a mental breakdown based
10 on Plaintiff's coherence only an hour earlier. (Tr. 29.) (3)
11 Plaintiff failed to follow through with prescribed treatment. The
12 ALJ notes that on August 19, 2005, Plaintiff is "noted to have not
13 been taking her medications regularly." (Tr. 30.) The ALJ also
14 pointed out that Plaintiff was discharged from treatment by her
15 therapist for refusing all treatment options. (Tr. 29.)

16 It is the province of the ALJ to make credibility
17 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
18 1995). However, the ALJ's findings must be supported by specific
19 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
20 1990). Once the claimant produces medical evidence of an underlying
21 impairment, the ALJ may not discredit his testimony as to the
22 severity of an impairment because it is unsupported by medical
23 evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
24 Absent affirmative evidence of malingering, the ALJ's reasons for
25 rejecting the claimant's testimony must be "clear and convincing."
26 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General
27 findings are insufficient: rather the ALJ must identify what
28 testimony is not credible and what evidence undermines the

1 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,
2 12 F.3d 915, 918 (9th Cir. 1993). Factors the ALJ may properly
3 consider include claimant's reputation for truthfulness, prior
4 inconsistent statements, unexplained failure to seek medical care or
5 to follow a prescribed course of treatment, and the claimant's
6 activities of daily living. See *Thomas v. Barnhart*, 278 F.3d 947,
7 958-959 (9th Cir. 2002).

8 The ALJ's credibility assessment, unchallenged on review, is
9 supported by the record and free of legal error.

10 The ALJ also considered the opinion of testifying expert Jay
11 Toews, Ed. D., when he weighed the medical evidence. (Tr. 24-27.)
12 Dr. Toews reviewed the medical records. (Tr. 790.) He opined
13 that, prior to October or November of 2003, Plaintiff's primary
14 problem was amphetamine dependence. (Tr. 792.) Dr. Toews observed
15 that since about October of 2003, Plaintiff was in very early
16 remission; she had no cognitive disorder as evidenced by a normal
17 mental status exam. Plaintiff was described as "bright and
18 articulate." A Shipley test result indicated an average IQ. (Tr.
19 793.) Dr. Toews pointed out Plaintiff's primary diagnosis in
20 November of 2003 by Albert Crook, D.O., was major depressive
21 disorder and a panic disorder without agoraphobia. Dr. Crook opined
22 that Plaintiff made "considerable improvement" when drug free; he
23 opined Plaintiff could work at least part-time and eventually full-
24 time. (Tr. 793, referring to Tr. 537.) Dr. Toews noted that
25 records show Plaintiff is rather histrionic. He assessed major
26 depressive disorder. (Tr. 794.) When Plaintiff takes prescribed
27 medication and is free of substance abuse, Dr. Toews opined that her
28 depression should be fairly stable. (Tr. 794.) The ALJ notes that

1 Dr. Toews assessed the following RFC if Plaintiff is not using
2 drugs:

3 [I]t is Dr. Toews' opinion that the claimant's functional
4 limitations as a result of her psychological disorders,
5 excluding substance abuse, would exhibit a mild degree of
6 limitation with regards to her activities of daily living.
7 She would exhibit moderate to marked limitations in
8 maintaining social functioning and mild to moderate
9 limitations in maintaining concentration, persistence or
10 pace. The claimant would exhibit no episodes of
11 decompensation. With further specificity, the claimant
12 would be moderately limited in understanding and
13 remembering detailed instructions; in completing a normal
14 workday and workweek without interruptions from
15 psychologically based symptoms and in performing at a
16 consistent pace without an unreasonable number and length
17 of rest periods in [a] complex job; in accepting
18 instructions and responding to criticism from supervisors;
19 and in responding appropriately to changes in the work
20 setting.

21 (Tr. 25-26, referring to Tr. 796.) Dr. Toews opined that the
22 opinion of Rebecca Alexander, Ph.D., (Tr. 566-572) was entitled to
23 little weight because other evidence indicates Plaintiff is bright
24 and relatively articulate. (Tr. 795.)

25 Plaintiff contends that the ALJ failed to properly weigh Dr.
26 Alexander's August 20, 2004, opinion. Based on test results, Dr.
27 Alexander assessed mild mental retardation. (Tr. 571.) The ALJ
28 points out Dr. Crook's note in November of 2003 that Plaintiff
completed credits in the Impact Program at Walla Walla Community
College with a high grade point average (3.74) and re-enrolled for
a full credit hour load. (Tr. 25-26.) The ALJ notes that Dr.
Alexander apparently relied quite heavily on "the subjective report
of symptoms and limitations provided by the claimant and seemed to
critically accept as true most, if not all, of what the claimant
reported." Yet, the ALJ notes, there are good reasons for
questioning the reliability of Plaintiff's subjective complaints.
(Tr. 26.) These are specific and legitimate reasons to discredit

1 Dr. Alexander's opinion.

2 The ALJ properly relied on the opinions of treating and
3 examining professionals Hendrickson, Reznicek, Bishop, Blankenship,
4 Anderson, Crook, and Moise when he considered the opinions of
5 examining psychologists Phillips, Wright, Gallaher, and Alexander.
6 Because Dr. Toews' opinion is supported by other evidence in the
7 record, specifically the records of treating and examining
8 professionals, the ALJ appropriately considered Dr. Toews' opinion
9 as well. The ALJ was not required to discuss the opinions of the
10 three other named psychologists because they are all consulting
11 agency psychologists (John McRae, Ph.D., at Tr. 282; James Bailey,
12 Ph.D., at Tr. 512, and Michael Brown, Ph.D., at Tr. 512.)

13 The ALJ's assessment of the medical evidence is supported by
14 the record and free of legal error.

15 **B. Listings and DAA analysis**

16 Plaintiff contends that the ALJ erred when he found that
17 Plaintiff's mental impairments did not meet or equal a Listings
18 impairment, specifically, by failing to properly credit Dr.
19 Alexander's report of August 20, 2004. (Ct. Rec. 15 at 13-15.) The
20 Commissioner responds that the ALJ found Plaintiff's impairments met
21 Listing 12.09 when Plaintiff's substance addiction disorder is
22 considered with her other mental impairments, but, without the
23 effects of substance abuse, Plaintiff's remaining impairments would
24 not prevent her from performing past relevant work. (Ct. Rec. 19 at
25 15.)

26 The weight given by the ALJ to Dr. Alexander's opinion has been
27 addressed and found to be without error. Accordingly, Plaintiff's
28 argument that Dr. Alexander's assessed limitations meet a Listing

1 level of impairment is unsupported by the record.

2 To the extent Plaintiff argues that the ALJ's DAA analysis is
3 flawed, the Commissioner responds that the record fully supports the
4 ALJ's findings. (Ct. Rec. 19 at 15.) Specifically, the
5 Commissioner argues that the record shows (1) substance abuse was
6 the basis for Plaintiff's mental impairments (from October or
7 November of 2003 and earlier); (2) when Plaintiff was not abusing
8 substances and compliant with prescribed medication "she was
9 consistently noted as being able to function"; and (3) whenever
10 Plaintiff exhibited a decline in functioning it was related to her
11 use of drugs. (Ct. Rec. 19 at 15-16.)

12 The record supports the Commissioner's argument. Plaintiff's
13 therapist Dee Davison, M. Ed., noted on August 22, 2002, that
14 Plaintiff was doing very well and had completed 18 college credits,
15 was enrolled for 15 credits in the fall, and had a goal of earning
16 an Associate of Arts degree. (Tr. 519.) In October and November of
17 2002, Plaintiff reported to Dr. Crook that she was feeling better
18 and her mood was "good most of the time now." (Tr. 522-523.) On
19 October 25, 2002, Jayme Mackay, M.D., noted Plaintiff's status as a
20 full-time student. (Tr. 470.) Plaintiff told Dr. Hendrickson on
21 May 23, 2003 (about four months before the amended onset date), that
22 her medications were much more effective when she was clean and
23 sober, and after two days of sobriety she was completing job
24 applications. (Tr. 452.) Dr. Hendrickson noted less than a month
25 later that "crystal crank" caused an emergency room hospitalization
26 for a "severe paranoid reaction." (Tr. 453.) In July of 2003,
27 David Kendrick, M.D., stated that, coming off of methamphetamine
28 five days ago, Plaintiff cut both her forearms with a box knife

1 because she thought bugs were crawling on her. (Tr. 482.) Dr.
2 Moise's physical exam on August 22, 2003, was highly consistent with
3 pain and weakness caused by purely psychiatric impairment. (Tr.
4 496.) Dr. Moise opined that Plaintiff may need an increase in
5 psychiatric medication. (Tr. 497.) On October 8, 2003, Plaintiff
6 told Dr. Crook she had been clean for 84 days and was "feeling
7 really good." (Tr. 534.) About a month later, Dr. Crook noted that
8 Plaintiff has made considerable improvement when she is drug free.
9 (Tr. 537.) He opined that Plaintiff should be able to work part-
10 time, and perhaps eventually full time, and that Dee Davison noted
11 Plaintiff has done well in school when she was substance free. (Tr.
12 537.)

13 The record reveals that Plaintiff does well when she is not
14 suffering from substance abuse, including earning good grades in
15 college courses. The record reveals that Plaintiff's substance
16 abuse has led to psychiatric hospitalizations for severe paranoia
17 (induced by methamphetamine overdose) and cutting herself (also
18 induced by amphetamine abuse). The ALJ conducted the *Bustamante*
19 analysis and found that, with substance abuse, Plaintiff's
20 impairments meet Listings 12.09. He then considered whether
21 Plaintiff's DAA was a materially contributing factor to the
22 disability determination. To make this determination, the ALJ
23 considered how Plaintiff functions with the impairments present when
24 DAA is excluded. After conducting the required DAA analysis, the
25 ALJ determined that, because substance abuse is a materially
26 contributing factor to Plaintiff's disability, benefits are barred.
27 The ALJ's analysis is supported by the record and free of legal
28 error.

1 **C. Residual Functional Capacity Assessment**

2 Plaintiff argues that the ALJ erred by failing to include all
3 of her impairments in his RFC determination. (Ct. Rec. 15, Att. at
4 10-13.) Defendant responds that the ALJ included all of the
5 impairments established by competent evidence and those existing
6 after excluding substance abuse. (Ct. Rec. 19 at 16-17.)

7 Resolving conflicts in evidence is reserved for the ALJ, not
8 the court. As noted, the ALJ properly weighed the medical and other
9 evidence. The RFC finding, based on the ALJ's proper assessment of
10 the medical evidence, is supported by the record and free of legal
11 error.

12 **D. VE's testimony**

13 Plaintiff alleges the ALJ erred because when Dr. Toews assessed
14 limitations were presented to the VE, the expert opined that there
15 are no jobs a person with Plaintiff's limitations could perform.
16 (Ct. Rec. 15, Att. at 12-13.)

17 The ALJ assessed the following mental RFC if there is no
18 substance abuse: Plaintiff could not do work with other than
19 perfunctory social interaction or requiring mastery and application
20 of complex or detailed information. (Tr. 27.) Plaintiff should
21 avoid work "where there is frequent changing in the work setting."
22 (Tr. 27.) The ALJ noted that Dr. Toews assessed (absent DAA) mild
23 limitations in the activities of daily living, moderate-to-marked
24 limitations in maintaining social functioning, mild to moderate
25 limitations in maintaining concentration, persistence or pace, and
26 no episodes of decompensation. (Tr. 27, referring to Tr. 796.) The
27 ALJ asked Dr. Toews if Plaintiff's assessed difficulty with
28 persistence, concentration or pace applied to performing simple,

1 repetitive tasks. Dr. Toews responded that the restrictions would
2 not apply. (Tr. 796.) The hypothetical that the ALJ asked the VE
3 included restricting the worker to only perfunctory social
4 interaction with co-workers and/or the public, no work requiring
5 mastery and application to work of complex or detailed information,
6 and no frequent changes in the work setting or procedures. (Tr.
7 806.) The ALJ's hypothetical included the impairments established
8 by the medical evidence. The ALJ's step four determination is
9 supported by the record and free of legal error.

10 **CONCLUSION**

11 Having reviewed the record and the ALJ's conclusions, this
12 court finds that the ALJ's determination is supported by substantial
13 evidence and free of legal error. Accordingly,

14 **IT IS ORDERED:**

15 1. Defendant's Motion for Summary Motion (**Ct. Rec. 18**) is
16 **GRANTED.**

17 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is
18 **DENIED.**

19 The District Court Executive is directed to file this Order,
20 provide copies to counsel for Plaintiff and Defendant, enter
21 judgment in favor of Defendant, and **CLOSE** this file.

22 DATED October 22, 2007.

23
24 S/ CYNTHIA IMBROGNO
25 UNITED STATES MAGISTRATE JUDGE
26
27
28